No. 93-318

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CONSUMER FEDERATION OF AMERICA; MCI COMMUNICATIONS CORPORATION; NEWSPAPER ASSOCIATION OF AMERICA; INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA; ASSOCIATION OF DIRECTORY PUBLISHERS; COMMERCE CLEARING HOUSE, INC.; COX ENTERPRISES, INC.; DIALOG INFORMATION SERVICES, INC.; GE INFORMATION SERVICES; INFORMATION INDUSTRY ASSOCIATION; INTERNATIONAL COMMUNICATIONS ASSOCIATION; MCGRAW-HILL, INC.; MEAD DATA CENTRAL, INC.; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; PRODIGY SERVICES COMPANY; TOWARD UTILITY RATE NORMALIZATION; WEST PUBLISHING COMPANY; THE WISCONSIN CITIZENS' UTILITY BOARD, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA; AMERITECH; BELL ATLANTIC CORPORATION; BELLSOUTH CORPORATION; NYNEX CORPORATION; PACIFIC TELESIS GROUP; SOUTHWESTERN BELL CORPORATION; U S WEST, INC.; *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE UNITED STATES TELEPHONE ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does the Tunney Act requirement for district court approval of a consent decree that is in the "public interest" mandate the district court to second guess the Justice Department's evaluation of the public interest by conducting its own *de novo* factfinding?

2. Does the Second Circuit's holding in *American Cyanamid* pose any conflict that merits review of the D.C. Circuit's holding below regarding the role of a district court in evaluating an uncontested petition to modify a consent decree under the "public interest" standard?

3. Is the D.C. Circuit's holding that the decree parties did not intend for uncontested modifications to be reviewed by the district court under the Section VIII(C) standard so specific to this particular case that petitioners' complaint about this holding fails to present a question worthy of review?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
SUMMARY	2
INTEREST OF THE UNITED STATES TELEPHONE ASSOCIATION	3
BRIEF HISTORY OF THE CASE	5
ARGUMENT	8
I. THE TUNNEY ACT REQUIREMENT TO APPROVE A CONSENT DECREE THAT IS IN THE PUBLIC INTEREST DOES *NOT* MANDATE SECOND GUESSING OF THE JUSTICE DEPARTMENT'S OWN EVALUATION OF THE PUBLIC INTEREST THROUGH *DE NOVO* FACTFINDING	8
II. THE SECOND CIRCUIT'S HOLDING IN *AMERICAN CYANAMID* DOES NOT CONFLICT WITH THE HOLDING BELOW REGARDING THE ROLE OF A DISTRICT COURT IN EVALUATING AN UNCONTESTED PETITION TO MODIFY A CONSENT DECREE UNDER THE "PUBLIC INTEREST" STANDARD	12
III. PETITIONERS' CRITICISM OF THE D.C. CIRCUIT'S HOLDING THAT THE PARTIES TO THIS DECREE DID NOT INTEND UNCONTESTED MODIFICATIONS TO BE REVIEWED UNDER DECREE SECTION VIII(C) FAILS TO PRESENT A QUESTION WORTHY OF REVIEW BECAUSE IT RAISES AN ISSUE THAT IS RELEVANT ONLY TO THE FACTS OF THIS PARTICULAR CASE	14
CONCLUSION	16

TABLE OF AUTHORITIES

FEDERAL CASES	Page
AMF, Inc. v. Jewett, 711 F.2d 1096 (1st Cir. 1983)	16
Brown Shoe Company v. United States, 370 U.S. 294 (1963)	13
Maryland v. United States, 460 U.S. 1001 (1983)	9
Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961)	11
Swift & Co. v. United States, 276 U.S. 311 (1928)	11
United States v. American Cyanamid Co., 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984)	13
United States v. Armour & Co., 402 U.S. 673 (1971)	6
United States v. Atlantic Refining Co., 360 U.S. 19 (1959)	6
United States v. Bechtel Corp., 648 F.2d 660 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981)	8
United States v. Chicago Board of Education, 717 F.2d 378 (7th Cir. 1983)	16
United States v. Gillette Co., 406 F. Supp. 713 (D. Mass. 1975)	9
United States v. ITT Continental Baking Co., 420 U.S. 223 (1975)	6
United States v. Mid-America Dairymen, Inc., 1977)	9
1977-1 Trade Cas. (CCH) ¶ 61,508 (W.D. Mo.	
United States v. Stroh Brewery Co., 1982-2 Trade Cas. (CCH) ¶ 64,804 (D.D.C. 1982)	9
United States v. Western Elec. Co., 993 F.2d 1572 (D.C. Cir. 1993)	7
United States v. Western Elec. Co., 767 F. Supp. 308 (D.D.C. 1991), *aff'd*, 993 F.2d 1572 (D.D.C. 1993)	6
United States v. Western Elec. Co., 900 F.2d 283 (D.C. Cir.), *cert. denied*, 111 S. Ct. 283 (1990)	6, 12, 15

TABLE OF AUTHORITIES—Continued

	Page
United States v. Western Elec. Co., 1989-2 Trade Cas. (CCH) ¶ 68,673 (D.D.C. 1989)	5
United States v. Western Elec. Co., 673 F. Supp. 525 (D.D.C. 1987), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir.), *cert. denied*, 111 S. Ct. 283 (1990)	5
United States v. Western Elec. Co., Civil No. 82-0192, slip. op. (D.D.C., Feb. 6, 1984)	15
United States v. Western Elec. Co., 578 F. Supp. 668 (D.D.C. 1983)	15
United States v. Western Elec. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983)	5, 12
United States v. Yoder Brothers, Inc., 1989-2 Trade Cas. (CCH) ¶ 68,723 (N.D. Ohio 1986)	8
FEDERAL STATUTES	
The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1988)	2
LEGISLATIVE MATERIALS	
H.R. Rep. No. 1463, 93d Cong., 2d Sess. 11 (1974)	11
S. Rep. No. 298, 93d Cong., 1st Sess. 3 (1973)	11
MISCELLANEOUS	
Brief of Amicus Curiae United States Telephone Ass'n, *United States v. Western Elec. Co.*, 993 F.2d 1572 (D.C. Cir., filed August 31, 1992)	4
Brief of Intervenor United States Telephone Ass'n, *United States v. Western Elec. Co.*, 900 F.2d 283 (D.C. Cir., filed May 8, 1989)	4
Comments of United States Telephone Ass'n, *United States v. Western Elec. Co.*, 673 F. Supp. 525 (D.D.C., filed Mar. 13, 1987)	4
Comments of United States Telephone Ass'n in Support of Joint Motion of Bell Operating Companies to Delete the Information Services Ban in Section II(D)(1) of AT&T Consent Decree, *United States v. Western Elec. Co.*, 767 F. Supp. 308 (D.D.C., filed Aug. 22, 1990)	4, 5

TABLE OF AUTHORITIES—Continued

	Page
2 M. Handler, *Twenty-Five Years of Antitrust* (1973)	9
Note, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility with Executive Discretion*, 35 Hastings L.J. 133 (1983)	11
Revised Rules of the Supreme Court, Rule 37.2, *reprinted in* Court Rules, U.S.C.S., lawyers ed. (May 1993 supp.)	3

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BRIEF OF AMICUS CURIAE UNITED STATES TELEPHONE ASSOCIATION IN SUPPORT OF RESPONDENTS

SUMMARY

The petition asks the Court to become involved in a narrow dispute about the appropriate role of a U.S. district court in reviewing a request to remove a provision from the consent decree ending the AT&T antitrust litigation; the subject provision prohibited the respondent Regional Bell Operating Companies ("Bell Companies") from providing information services to consumers. No party to the decree had objected to removal of this provision.

Petitioners assume for purposes of their arguments 1 and 2 that the court below properly held that the district court is legally obligated under the Tunney Act [1] to eliminate the information services restriction if doing so is in the "public interest." But they contend in argument 1 that the Tunney Act's "public interest" standard requires the district court to make a *de novo* review of the record rather than perform the narrower factfinding role assigned by the court below. And they claim in argument 2 that there now is a serious conflict between two circuits—the Second Circuit and the D.C. Circuit—on the proper factfinding role of a district court in deciding whether to grant uncontested petitions to modify decrees.

In argument 3, petitioners contend that it was unlawful for the court below to require the district court to employ the "public interest" factfinding standard. They base this argument on their contention that when using established rules for interpreting decrees it is clear that parties to this particular decree intended the supposedly broader factfinding standard in Section VIII(C) of the subject decree to govern uncontested petitions for modification.

As shown below, none of petitioners' three arguments presents a basis for review of the decision below. With

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[1] The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1988). This Act is named after its chief Congressional sponsor, Senator John Tunney.

regard to arguments 1 and 2, the limited role performed by the district court is consistent with the Tunney Act's "public interest" standard as construed by many lower federal courts, including the Second Circuit; indeed, constitutional principles of separation of powers mandate such a limited factfinding role. Argument 3 plainly does not present an issue worthy of review because the question it raises is specific to this particular decree, with *no* applicability *beyond* this particular case.

At bottom, this petition is a final, desperate act to stifle additional competition in the information services market and thus deny to consumers the benefits that such competition will bring. Petitioners view the district court judge charged with overseeing this particular decree as more sympathetic to their objectives, and they have concocted the legal theories presented in their petition as a last-ditch effort to get the case returned to that forum. However, experience now shows that eliminating the information services ban in order to permit Bell Company involvement in this market benefits competition in that market. Since the ban was lifted two years ago, Bell Companies have made numerous targeted investments in the information services market, and the market is robustly competitive.

INTEREST OF THE UNITED STATES TELEPHONE ASSOCIATION

The United States Telephone Association ("USTA") is the primary trade association of the local telephone industry.[2] Its membership consists of more than 1,000 telephone companies and includes the 22 telephone companies owned by the Bell Companies, which provide local telephone service to about 78 percent of the United States

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[2] Pursuant to Court Rule 37.2, USTA has provided the Clerk with letters from all parties giving USTA permission to file the present brief. *See* Revised Rules of the Supreme Court, Rule 37.2, *reprinted in* Court Rules, U.S.C.S., lawyers ed. (May 1993 supp.)

population. The remaining USTA members provide local telephone service to about 20 percent of the country's population living in more than 50 percent of its land area.

Throughout this proceeding, USTA has supported elimination of the information services ban from the subject decree. It has filed briefs at every step of the proceeding.[3]

USTA has supported removal of the information services ban even though such removal would give Bell Companies the right to provide information services to the roughly 50 million people served by USTA's non-Bell Company members. USTA has done so for three reasons. *First*, eliminating the ban will promote more rapid introduction of information services throughout the United States, a result that will benefit all consumers, including the customers of USTA's non-Bell Company members.[4] *Second*, removing the ban will promote modernization and enhancement of the telephone network infrastructure of hundreds of USTA member telephone companies hav-

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[3] *See* "Comments of U.S. Teleph. Ass'n", *U.S. v. West. Elec. Co.*, 673 F. Supp. 525 (D.D.C., filed Mar. 13, 1987) (urging elimination of the information services ban); "Brief for Intervenor U.S. Teleph. Ass'n", *U.S. v. West. Elec. Co.*, 900 F.2d 283 (D.C. Cir., filed May 8, 1989) (urging reversal of district court order reported at 673 F. Supp. 525 declining to grant uncontested petitions to eliminate the ban); "Comments of U.S. Teleph. Ass'n in Support of Joint Mot. of Bell Op. Companies to Delete the Info. Services Ban in Sec. II(D)(1) of AT&T Consent Decree", *U.S. v. West. Elec. Co.*, 767 F. Supp. 308 (D.D.C., filed Aug. 22, 1990) (supporting elimination of the ban pursuant to court of appeals order reported at 900 F.2d 283 remanding case to district court for consideration of petition under "public interest" standard); "Brief of Amicus Curiae U.S. Teleph. Ass'n", *U.S. v. West. Elec. Co.*, 993 F.2d 1572 (D.C. Cir., filed Aug. 31, 1992) (supporting district court post-remand order reported at 767 F. Supp. 308 eliminating ban under "public interest" standard).

[4] *See, e.g.*, "Comments of U.S. Teleph. Ass'n in Support of Joint Mot. of Bell Op. Companies to Delete the Info. Services Ban in Sec. II(D)(1) of AT&T Consent Decree," *supra*, at 5.

ing no affiliation with a Bell Company.[5] *Third,* eliminating the ban will help ensure the rapid availability of numerous technical improvements to regular telephone service offered by hundreds of USTA member telephone companies who are unaffiliated with a Bell Company.[6]

BRIEF HISTORY OF THE CASE

On August 24, 1982, during the trial of the government's antitrust action against AT&T, the district court entered a consent decree. Section II(D) of the decree prohibited the Bell Companies from engaging in certain lines of business, including the provision of information services. *United States v. Western Elec. Co.,* 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States,* 460 U.S. 1001 (1983).

In 1987, the Department of Justice and the Bell Companies petitioned the district court to eliminate the information services ban from the decree. The only other party to the decree, AT&T, did not oppose these petitions.[7]

Notwithstanding the consent of all parties to the decree, the district court refused to eliminate the information service ban on the ground that the Bell Companies had not met their burden of proof under Section VIII(C) of the decree. *United States v. Western Elec. Co.,* 673 F. Supp. 525, 532-35 (D.D.C. 1987). That provision requires a petitioning Bell Company to show that "there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." *United States v. Western Elec. Co., supra,* 552 F. Supp. at 231.

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[5] *Id.* at 6.

[6] *Id.* at 6-7. USTA also has supported eliminating the ban on grounds that it unconstitutionally infringes the Bell Companies' First Amendment speech rights.

[7] A provision in the decree that had barred AT&T from providing certain types of information services was eliminated by the district court more than four years ago. *U.S. v. West. Elec. Co.,* 1989-2 Trade Cas. (CCH) ¶ 68,673 (D.D.C. 1989).

On appeal, the D.C. Circuit Court of Appeals rejected use of the Section VIII(C) test and directed the district court on remand to review the uncontested modification petition under the less demanding "public interest" standard. *United States v. Western Elec. Co.*, 900 F.2d 283, 306-07 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 283 (1990). Under that standard, the district court must approve a proposed decree "so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*." *Id.* at 307 (emphasis in original). This is the well-established standard that district courts use to evaluate uncontested petitions involving consent decrees in the absence of a finding that the parties' clear intent was to the contrary.[8]

In rejecting use of the Section VIII(C) test, the appeals court relied on conventional tools for interpreting consent decrees established by this Court in cases like *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975); *United States v. Armour & Co.*, 402 U.S. 673 (1971); and *United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959). Applying these tools, the court held that the parties to this particular decree had intended that the Section VIII(C) test would be used *only* to resolve petitions for decree modification that are *contested* by one or more decree parties and that they had intended the district court to review *uncontested* petitions under the "public interest" standard.

On remand, the district court granted the petition (albeit reluctantly) to lift the information services ban, finding that the "public interest" standard had been met. *United States v. Western Elec. Co.*, 767 F. Supp. 308, 329 n.101 (D.D.C. 1991). The court rendered its decision after permitting oral argument and after accepting written evidence of impact on the public interest that had been submitted in the remand proceeding by parties and

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[8] *See* Argument 1, *infra*.

by a broad range of intervenors and amici, including USTA.

On appeal, the D.C. Circuit Court of Appeals upheld the district court order eliminating the ban, flatly rejecting the petitioners' argument that the Tunney Act's "public interest" standard requires a district court to make an independent evaluation of the public interest. Instead, the appeals court restated its earlier holding limiting the district court to determining whether the decree parties' unanimous evaluation of the public interest is within the zone of settlements consonant with the public interest. *United States v. Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir. 1983). It explained that an uncontested modification proposal which the parties "reasonably regarded as advancing the public interest" meets this standard (*id.*), and it noted that a district court may reject an uncontested modification under this standard "only if it has exceptional confidence that adverse anticompetitive consequences will result . . . ." *Id.* at 1577. The appeals court held that the record compiled in the district court provided "an ample factual foundation" to support a finding that eliminating the ban is within the zone of settlements consonant with the public interest. *Id.* at 1582.[9] And it noted that the support of USTA and the Computer and Communications Industry Association ("CCIA") for eliminating the ban "is something of a vindication" of this holding, since USTA and CCIA members could be hurt if any Bell Company were to compete unfairly in the information services market. *Id.*

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[9] Indeed, the appeals court held that the record was sufficiently strong that the district's court's ruling would have been "clearly erroneous" if it had found that eliminating the ban is *not* within this zone. *Id.* at 1578.

ARGUMENT

I. THE TUNNEY ACT REQUIREMENT TO APPROVE A CONSENT DECREE THAT IS IN THE PUBLIC INTEREST DOES *NOT* MANDATE SECOND GUESSING OF THE JUSTICE DEPARTMENT'S OWN EVALUATION OF THE PUBLIC INTEREST THROUGH DE NOVO FACTFINDING

As their lead argument, petitioners assert that the appeals court assigned a factfinding role to the district court when deciding whether an uncontested modification to a consent decree is in the public interest that is proscribed by the Tunney Act. Whereas the appeals court limited the district court's review of the "public interest" to a determination of whether an uncontested decree modification is within "the zone of settlements consonant with the public interest today," petitioners assert that the Tunney Act permits uncontested modifications *only* after the district court makes a public interest determination based on its own *de novo* review of all relevant public interest factors. Pet. at 12-17.

The petition should not be granted on the basis of this argument by the petitioners because the argument—quite simply—is wrong. Not only do petitioners fail to cite a single case in which any court has held that the Tunney Act requires district courts to engage in *de novo* factfinding under the "public interest" standard, they also ignore numerous cases in which the *de novo* factfinding they advocate has been rejected. *See, e.g., United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981) ("The court's role [in deciding whether to approve a consent decree] is one of insuring that the government has not breached its duty to the public in consenting to the decree [by determining] whether the settlement 'is within the reaches of the public interest' ") (citations omitted); *United States v. Yoder Bros., Inc.*, 1989-2 Trade Cas. (CCH) ¶ 68,723 at 61,795 &

n.5 (N.D. Ohio 1986) ("Absent a showing of corrupt failure of the government to discharge its duty, the [District] Court, in making its public interest finding, should . . . carefully consider the explanations of the government . . . and its responses to comments in order to determine whether those explanations are reasonable under the circumstances") (quoting *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508 at 71,980 (W.D. Mo. 1977) (ellipses in original)); *United States v. Stroh Brewery Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,804 at 71,960 (D.D.C. 1982) ("although [under the Tunney Act] we are not sitting to 'rubber stamp' any proposed consent order, we will not substitute our judgment") (internal quotation omitted); *United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975) (district court's proper role is to ensure that the Department of Justice acted in good faith, to give parties with opposing views an opportunity to submit those views, and to determine that the government has made a "considered decision" to accept the decree).[10] Indeed, then-Justice Rehnquist's dissent in *Maryland v. United States*, 460 U.S. 1001, 1004-06 (1983), explained that if the Tunney Act's "public interest" test were construed to require courts to re-decide a decision by the Department of Justice, a serious Constitutional issue would be raised under fundamental separation-of-powers principles by vesting in a court the type of discretionary policy judgment that properly resides in the executive branch.[11]

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[10] *See also* 2 M. Handler, *Twenty-Five Years of Antitrust*, 883-84 (1973) (footnotes omitted):

> Once satisfied of the parties' good faith, a court has, in my opinion, no alternative but to accept both the government's judgment as to what the public interest demands and the compromise that the parties have wrought through their negotiations.

[11] Although petitioners seek to avoid the separation of powers problem noted by then-Justice Rehnquist by asserting that the

Lacking judicial support for the *de novo* factfinding role which they claim the Tunney Act requires district courts to perform under the "public interest" standard, petitioners assert that the Act's plain language and its legislative history support a requirement for such *de novo* factfinding. Pet. at 12-13, 16. Thus, they state that the Tunney Act's requirement that "the *court* shall determine that the . . . judgment is in the public interest" (emphasis added) proves that the Act itself requires *de novo* factfinding by the district court. Pet. at 12. They quote two snippets from the Tunney Act's legislative history—that the Act was intended to end judicial "rubber stamping" and that the Act requires "independent judgment"—to bolster their assertion that the Act mandates *de novo* district court factfinding. Pet. at 15. And they contend that Congress would have stated explicitly that the Act gives district courts limited factfinding power if that is what Congress intended. Pet. at 15.

Petitioners read far too much into the Tunney Act words that the "*court* shall determine" (emphasis added) that the proposed decree is in the public interest since this requirement says *nothing* about the *nature* of the role the court must perform in *making* that determination. The bits of legislative history to which they refer do not help their case for the same reason.

"public interest" inquiry here "involves a [specific] factual inquiry into the effect of the proposed[ed decree] on competition" rather than some more ambiguous factual inquiry (Pet. at 17 n.28), this does *not* avoid the problem. In his dissent, Justice Rehnquist stated that *any* attempt by a court to eliminate a separation of powers issue by defining "public interest" narrowly would fail:

> It is not clear to me that . . . *any* [] standard [for determining whether a consent decree is in the public interest that] the District Court could have devised, admits of resolution by a court exercising the judicial power established by Art. III of the Constitution. 460 U.S. at 1004 (emphasis added).

In fact, the legislative history shows plainly that Congress intended the district court's factfinding role under the Tunney Act's "public interest" standard to be limited in the manner required by the court below. For example, the House Report explained that the Tunney Act would "not . . . change case law construing the 'public interest' in cases involving the antitrust laws . . . ." H.R. Rep. No. 1463, 93d Cong., 2d Sess. 11 (1974); *accord* S. Rep. No. 298, 93d Cong., 1st Sess. 3 (1973). That case law could not have been more clear: in determining whether an antitrust consent decree is in the public interest, this Court had ruled unambiguously that "sound policy would strongly lead us to decline [an] invitation to assess the wisdom of the Government's judgment in negotiating and accepting [a] consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689 (1961); *see also Swift & Co. v. United States*, 276 U.S. 311 (1928).

Finally, the fact that Congress did not state explicitly in the Tunney Act that the Act's "public interest" standard gives district courts only a limited factfinding role does *not* create an inference that Congress intended an *expansive* role. To the contrary, the common law principle of limited district court factfinding power in considering consent decree settlements was so well established at the time the Tunney Act was passed that Congress explicitly would have established *de novo* factfinding power for district courts if that is what it had intended to do.[12]

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[12] *See* Note, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility with Executive Discretion*, 35 Hastings L.J. 133, 151 n.143 (1983) ("[t]he Supreme Court pronouncements in *Swift & Co.* . . . and *Sam Fox Publishing* had been widely cited and followed by the lower courts. It is inconceivable that Congress was unaware of these pronouncements or that it intended for the courts to disregard the spirit of these two cases without even a hint of Congressional disapproval of them").

A review of the circumstances under which the information services ban was included in the decree demonstrates plainly that it would be a perverse injustice if the Tunney Act's "public interest" standard somehow was held to require *de novo* district court factfinding in this case. In entering this decree pursuant to the Tunney Act, the district court held that the proposed line of business restrictions to which the decree parties had agreed, including the information services ban, were *permissible,* but not *mandatory,* to protect the public interest. *See, e.g.,* 552 F. Supp. at 161, where the court held that "[i]t would be inappropriate for the Court at this juncture to draw definitive conclusions with regard . . . to the sufficiency of the evidence to sustain a finding of liability . . . . The Court is not called upon, in this public interest proceeding to render a final judgment on this case . . . ." *See also* 900 F.2d at 307. It would be unjust to conclude that a provision the district court found *permissible* but not mandatory under the Tunney Act's "public interest" standard when the decree was entered could now be mandatory in the absence of a finding by the same district court that the ban no longer helps achieve the public interest.

II. THE SECOND CIRCUIT'S HOLDING IN *AMERICAN CYANAMID* DOES NOT CONFLICT WITH THE HOLDING BELOW REGARDING THE ROLE OF A DISTRICT COURT IN EVALUATING AN UNCONTESTED PETITION TO MODIFY A CONSENT DECREE UNDER THE "PUBLIC INTEREST" STANDARD

Petitioners next urge that their petition be granted on the ground that the district court's role in the D.C. Circuit for evaluating consent decrees under the "public interest" standard conflicts with the district court's role in the Second Circuit. Pet. at 18-22. According to petitioners, whereas the D.C. Circuit requires the district court to defer to the Justice Department's public interest

evaluation, the Second Circuit, in *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984), requires the district court to make a *de novo* evaluation of the public interest. Pet. at 18.

There is *no* conflict between the circuits on this point. Contrary to the petitioners' contention, *Cynamid* does *not* dictate a district court's role under the "public interest" standard in the Second Circuit. While petitioners are correct that the Second Circuit held in *Cyanamid* that the district court in *that particular case* must make an independent evaluation of whether to vacate the decree as the uncontested petition had requested, the court's ruling was based upon its conclusion that the parties had *intended* to give the court this special factfinding role in deciding petitions to vacate the decree (including an uncontested petition), and that this intent was reflected in Section XI of the decree itself. That provision expressly conditioned vacation of the decree on a showing *"to the satisfaction of* [*the decree c*]*ourt* that the effect . . . will not be substantially to lessen competition . . . ." 719 F.2d at 564 (emphasis added). Moreover, the Second Circuit in *Cyanamid* did not reject a policy judgment by the Department of Justice as petitioners desire here; instead, it rejected the Justice Department's attempt to disavow *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), as the authoritative interpretation of the Clayton Act for vertical mergers. 719 F.2d at 567. Thus, *Cyanamid* stands for the traditional view of a court's duty to interpret and enforce the law whereas, by seeking to apply the *Cyanamid* standard in the present case, petitioners ask that the standard be applied in reviewing executive branch policy judgments.

III. PETITIONERS' CRITICISM OF THE D.C. CIRCUIT'S HOLDING THAT THE PARTIES TO THIS DECREE DID NOT INTEND UNCONTESTED MODIFICATIONS TO BE REVIEWED UNDER DECREE SECTION VIII(C) FAILS TO PRESENT A QUESTION WORTHY OF REVIEW BECAUSE IT RAISES AN ISSUE THAT IS RELEVANT ONLY TO THE FACTS OF THIS PARTICULAR CASE

Finally, petitioners ask the Court to review this case in order to determine whether the parties to this decree intended that the district court undertake the factfinding role contemplated by Section VIII(C) of the decree rather than the role contemplated under the "public interest" standard as the appeals court found. Petitioners' view is that the parties intended that the district court perform the factfinding function contemplated in Section VIII(C) in deciding *all* decree modification petitions, and they claim that this view is supported by the "normal meaning" of Section VIII(C), "six years of history" in administering the decree, and the district court's interpretation of the decree—all of which are to be considered under rules of construction laid down in *Atlantic Refining Co.*, 360 U.S. 19 (1959). Pet. at 22-25.

Even if the petitioners had raised a question of whether the appeals court wrongly held that the parties did not intend Section VIII(C) to establish the district court's role in deciding uncontested modification petitions, this holding was so specific to this particular decree that it plainly does not merit review. There is absolutely nothing to distinguish the opinion below from any other case in which participants dispute the meaning of a provision in a decree, a court applies traditional rules of construction to determine the meaning, and some participants persist in insisting that rules of construction were misapplied to the facts of the subject decree.

In fact, the petitioners have not called into question the court's ruling on this issue because the court plainly did *not* come to a faulty conclusion in applying traditional

rules of construction for interpreting provisions of consent decrees. First, petitioners have not shown that as a matter of law the "normal meaning" of Section VIII(C)'s language requires the district court to apply that provision to uncontested petitions. Indeed, they ignore the fact that *all parties* to the decree informed the district court in 1982 that their intent was that uncontested petitions would be reviewed under the "public interest" test rather than under Section VIII(C). 900 F.2d at 306 (quoting 1982 brief of the United States and citing 1982 AT&T brief to the same effect).

Second, although petitioners are correct that the district court had analyzed several previous uncontested petitions to modify this decree under Section VIII(C), this does not prove that the appeals court ignored "six years of history" when it ruled that such petitions should be evaluated by the district court under the traditional "public interest" standard. This is because, until the present case, the district court routinely had granted uncontested petitions for modification under the Section VIII(C) standard, thus leaving decree parties with little incentive to appeal. In addition, just as the district court previously had analyzed some undisputed petitions under Section VIII(C), it had analyzed *others* under the "public interest" standard. *See, e.g., United States v. Western Elec. Co.*, 578 F. Supp. 658, 660 (D.D.C. 1983); *United States v. Western Elec. Co.*, Civil No. 82-0192, slip. op. at 10 (D.D.C., Feb. 6, 1984).

Finally, it is not true that the court below failed "to give any deference" to the district court's view that Section VIII(C) defines the appropriate factfinding role for the district court in uncontested modification proceedings. The opinion of the appeals court states on its face that the court took careful account of the district court's contemporaneous interpretation of the circumstances under which Section VIII(C) would be used. 900 F.2d at 294 n.10. Although petitioners cite several cases in which

other appeals courts have affirmed a district court's view of a consent decree based in part on the district court's own statement of its view, none of these cases holds that a district court's view must be accepted as a matter of law by an appeals court if the appeals court finds, after applying other rules of construction, that the district court's interpretation was erroneous. Indeed, other appeals courts have overturned district court decree interpretations when they concluded that those interpretations were wrong. *See, e.g., AMF, Inc. v. Jewett,* 711 F.2d 1096, 1102 (1st Cir. 1983); *United States v. Chicago Board of Education,* 717 F.2d 378, 382 (7th Cir. 1983).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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